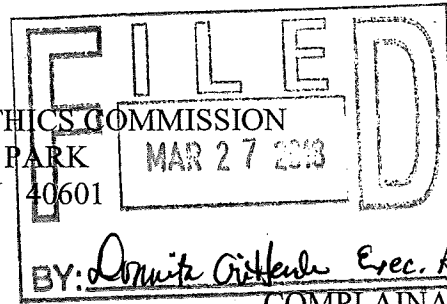


KENTUCKY LEGISLATIVE ETHICS COMMISSION  
22 MILL CREEK PARK  
FRANKFORT, KY 40601



REP. JIM WAYNE

COMPLAINANT

VS.

NO. 17-LEC-01

REP. JEFF HOOVER  
REP. JIM DECESARE  
REP. BRIAN LINDER  
REP. MICHAEL MEREDITH

RESPONDENTS

**ENFORCEMENT COUNSEL'S  
PRE-HEARING MEMORANDUM**

\* \* \* \* \*

This Memorandum is submitted by the Commission's Enforcement Counsel in advance of the Final Adjudicatory Hearing with the intent of assisting members of the Commission. Members of the Commission should, of course, refrain from reaching any final decision on the merits of the case until the evidence is presented at the hearing.

**PRELIMINARY MATTERS**

1. ELECTION OF A CHAIRPERSON.

KRS 6.656(1) says the vice-chair shall preside in the absence or disability of the chair. It does not establish that the vice-chair will become the chair upon the chair's resignation.

2. EVIDENTIARY RULINGS.

The administrative regulation<sup>1</sup> governing adjudicatory proceedings will be used for the first time in this hearing. While the Commission Chairperson has authority to consider procedural matters such as postponements, substantive rulings like the exclusion of evidence must be made

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<sup>1</sup> 2 KAR 2:060

by the Commission. Under KRS 6.691(1), the Kentucky Rules of Evidence and Rules of Civil Procedure apply to adjudicatory hearings.

Enforcement Counsel suggests that the Commission establish a workable process by which rulings on the admissibility of evidence be made. For example, should rulings be made by vote of the Commission or should the Commission agree in advance that one or more of the Commissioners should be entrusted with that authority?

### 3. SPECIAL CONSIDERATIONS UNDER KRS 6.691

In addition to stating that witnesses shall be given all the due process rights, privileges and responsibilities of a witness in court, paragraph (1) of KRS 6.691 states that all witnesses shall be entitled to be represented by counsel. The statute does not specify what role the witness's lawyer may play during the proceeding.

Paragraph (2) of the same statute contains a provision that any person whose name is mentioned during the adjudicatory proceedings and who may be adversely affected thereby, shall have the right to appear personally before the Commission to give a statement in opposition to such adverse mention or file a written statement. The statute provides that such a statement should be incorporated into the record of the proceeding but does not specify that it must be prior to the Commission's decision.

The adjudicatory hearing is public unless the Commission goes into executive session as provided by KRS 61.810 (exceptions to the open meetings law). The only provision of that statute that appears to be applicable is section (j):

(j) Deliberations of judicial or quasi-judicial bodies regarding individual adjudications or appointments, at which neither the person involved, his representatives, nor any other individual not a member of the agency's governing

body or staff is present, but not including any meetings of planning commissions, zoning commissions, or boards of adjustment;

#### 4. THE "DEMAND" LETTER

Enforcement Counsel seeks a decision by the Commission whether to attempt to compel production of the so-called "demand letter."

Enforcement Counsel has not been provided a copy of the letter reportedly sent to Rep. Hoover by Jane Doe's attorney that initiated a settlement discussion resulting in the confidential agreement described in the Complaint. Enforcement Counsel has requested, as part of discovery, to inspect the letter to determine if it contains admissible evidence. Counsel for Hoover, DeCesare and Linder has steadfastly refused to provide a copy of the letter and said she will seek a ruling from the Franklin Circuit Court if the Commission issues a subpoena for it. Counsel for Linder indicates he does not have a copy of the letter.

Enforcement Counsel believes that while the letter is probably discoverable, it will likely be inadmissible as evidence under KRE 408 which states that compromise and offers of compromise are not admissible to prove liability for a claim. If it is not admissible evidence, then the letter should not be viewed by the Commission in the hearing.

#### 5. THE PROPOSED ORDER OF PROCEEDING IN THE ADJUDICATORY HEARING.

This Complaint involves four Respondents. The same confidential agreement was signed by all of them. It is therefore proposed that issues centering on the confidential agreement be presented first.

The issue of whether the conduct of the individual respondents violates the Ethics Code are different as to each Respondent. As to Meredith, Linder and DeCesare, the attorneys are attempting to agree on the wording of written stipulations of evidence which will be submitted to the Commission in lieu of testimony. This process should allow the Commission to address the

merits of each case against those Respondents without testimony and without subjecting Jane Doe to cross-examination on these events.

The allegations against Representative Hoover are more complex and will require the presentation of testimony.

## **STATEMENT OF THE CASE**

### **1. COMPLAINT AND INVESTIGATION.**

Complaint 17-LEC-01 was filed on November 15, 2017 following news reports that the Respondents had reached a confidential settlement with a female state employee over allegations of inappropriate behavior.<sup>2</sup> The Complaint did not contain the identity of the employee and secrecy of the agreement initially complicated the investigation. The employee's name was learned during the investigation but for purposes of this memorandum she will still be identified as "Jane Doe."

Further delaying the fact-finding process, two "whistleblower" lawsuits have been filed by current or former state employees who are prospective witnesses in this matter and, along with other individuals questioned, they are represented by attorneys through whom interviews had to be arranged.

At the Preliminary Inquiry Hearing, all Respondents waived the evidentiary hearing after motions for dismissal were denied.

### **2. STATEMENT OF LEGAL ISSUES**

The ultimate issue for the Commission is whether any or all of the Respondents violated the Kentucky Code of Legislative Ethics.

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<sup>2</sup> Complaint 17-LEC-02 was filed by Rep. Osborne on December 1<sup>st</sup> on related questions. That Complaint is not part of this Adjudicatory Hearing.

Based on pre-hearing discussions with Respondents' attorneys, and the pre-hearing Memoranda submitted by Counsel for the Respondents, Enforcement Counsel believes that the following questions are likely to arise during the adjudication process:

(a) DOES KRS 6.731(3) APPLY TO WORKPLACE SEXUAL HARASSMENT WHEN A LEGISLATOR IS THE PERPETRATOR AND DOES THE STATUTE PROVIDE SUFFICIENT NOTICE THE CONDUCT IS PROHIBITED?

While there is no specific mention in the current Ethics Code of sexual harassment or harassment of an employee<sup>3</sup>, the Commission has, in a well-publicized case, found that a legislator who harassed LRC employees in the workplace violated subsection (3) of KRS 6.731 by using his official position to secure or create privileges, exemptions, advantages, or treatment for himself in direct contravention of the public interest at large.<sup>4</sup> As was shown in that case, an *elected* member of the House of Representatives cannot be disciplined by the LRC. Only this Commission or the House of Representative itself have the authority to impose any penalty against a legislator.

That is why workplace harassment of employees by legislators must be addressed by this Commission. The power and protection of the legislator's office means an employee is left with little protection unless he or she chooses to initiate a lawsuit.

Is such misconduct against the public interest? It is against the interest of the state employee who is subjected to the harassment and it is against the interest of the public at large if they are financially responsible for any judgment against the Commonwealth if the plaintiff in a lawsuit prevails. And the public is also penalized by the disruption to the Legislature that events of this nature cause.

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<sup>3</sup> It is noted that there is no mention of any specific conduct in paragraph (3). Nevertheless, various types of misconduct such using the influence of legislative office to influence a judge in favor of a litigant has been found by the Commission to be a violation of the statute.

<sup>4</sup> 13-LEC-02, 03, and 04.

The statute and its interpretation by this Commission are sufficiently clear that any legislator would have to know that sexual harassment of employees in the workplace or in work related activities are prohibited by the Code of Ethics.

**(b) DOES THE COMPLAINT COMPLY WITH KRS 6.686 AND THEREBY GIVE THE COMMISSION JURISDICTION TO CONDUCT THE ADJUDICATORY PROCESS?**

This argument was raised at the Preliminary Inquiry Hearing and was denied by the Commission.

KRS 6.686(1) states that a complaint must state the essential facts constituting the violation. It does not require personal knowledge of the facts. In this case the essence of the complaint was the assertion that respondents confidentially settled sexual harassment claims with an employee and, that these claims were supported by a number of news sources. The complaint cited public statements from Rep. Hoover that admitted inappropriate text messages and Rep. Linder who admitted a mistake.

This is not a constitutional issue as it would be in the case of challenging an invalid search warrant or invalid arrest warrant. This is a provision designed only to require that the Commission have a basis for *investigating* a complaint, something that it formerly had the authority to do without any complaint.

**(c) IS THE COMPLAINT BARRED BY A ONE YEAR STATUTE OF IMITATIONS?**

The short answer is no. This Complaint is being treated as Ethical Misconduct rather than as a criminal offense. Every violation of the Ethics Code is "Ethical Misconduct" even if may also be prosecuted in court as a crime.<sup>5</sup>

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<sup>5</sup> KRS 6.611(14) "Ethical Misconduct" means any violation of the Kentucky Code of Legislative Ethics.

This Commission has jurisdiction over violations of the Ethics Code and disposition of complaints filed pursuant to KRS 6.686.<sup>6</sup> It does not have any jurisdiction over criminal offenses and cannot impose a criminal penalty. To Enforcement Counsel's knowledge, the Commission has never taken the position that there is a twelve month statute of limitations when a criminal penalty isn't involved.

#### STATEMENT OF THE EVIDENCE

Enforcement Counsel will not offer a detailed statement of the evidence until the Adjudicatory Hearing begins.

The Commission can expect to hear testimony from Rep. Wayne and Jane Doe, as well as the Director of LRC, David Byerman, Commission Investigator James Curless, and several of Doe's co-employees.

Although the confidential agreement releases the LRC and its employees from liability, the LRC did not ratify or approve the settlement. A copy of the confidential agreement will be provided to the Commission.

There is no evidence that LRC or the Commonwealth of Kentucky paid any portion of the settlement or that the amount was paid for by illegal campaign contributions or legislative agents. Counsel for the Respondents have agreed to provide certified copies of financial documents showing the sources of funds used to pay the settlement amount.

#### STANDARD OF PROOF:

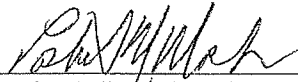
The legal standard is "clear and convincing" proof that there has been a violation and there must be an affirmative vote of five or more Commission members for any affirmative action.

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<sup>6</sup> KRS 6.666(1) and (2)

## PLEA NEGOTIATIONS

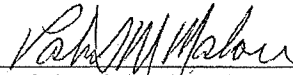
The Commission has not authorized any plea negotiations on these cases.



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## CERTIFICATE OF SERVICE

This is to certify that the foregoing was served by email and by hand delivering true copies to the law offices of Hon. Leslie Vose, Attorney for Respondents Jeff Hoover, Jim DeCesare, and Michael Metcalf and Hon. Kerry Harvey, Attorney for Brian Linder on this 27<sup>th</sup> day of March, 2018.



Patrick Michael Malone